APPENDIX

APPENDIX A

OPINIONS BELOW

James Ricky Jones; Vera Jones, AIK Selective Self-Insurance Fund, vs. City of Carlisle, Kentucky; Preferred Risk Mutual Insurance Company; Mark Byrd,
No. 92-6103 (United States Court of Appeals for the Sixth Circuit, August 27, 1993) 3a-14a

James Ricky Jones; Vera Jones, AIK Selective Self-Insurance Fund, vs. City of Carlisle, Kentucky, et al.,
Civil Action No 91-516 (United States District Court Eastern District of Kentucky, June 12, 1992) 15a-29a

James Ricky Jones; Vera Jones, AIK Selective Self-Insurance Fund, vs. City of Carlisle, Kentucky, et al.,
Civil Action No 91-516 (United States District Court Eastern District of Kentucky, July 21, 1992) (Order denying Motion to Alter, Amend or Vacate)..... 31a-33a

James Ricky Jones; Vera Jones, AIK Selective Self-Insurance Fund, vs. City of Carlisle, Kentucky; Preferred Risk Mutual Insurance Company; Mark Byrd,
No 92-6103 (United States Court of Appeals for the Sixth Circuit, October 13, 1993) (Order denying Petition for Rehearing) 35a

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

NO. 92-6103

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES RICKY JONES; VERA JONES,
Plaintiff-Appellants,

AIK SELECTIVE SELF INSURANCE FUND,
Intervening Plaintiff,

V.

ON APPEAL from the United States District Court for the Eastern District of Kentucky

CITY OF CARLISLE, KENTUCKY; PREFERRED RISK MUTUAL INSURANCE COMPANY; MARK BYRD,
Defendants-Appellees.

Decided and Filed August 27, 1993

Before: GUY and SUHRHEINRICH, Circuit Judges; and DOWD, District Judge.*

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*The Honorable David D. Dowd, Jr., United States District Judge for the Northern district of Ohio, sitting by designation.

DOWD, District Judge, delivered the opinion of the court.

I.

The appellants, James Ricky Jones (hereafter "Mr. Jones") and his wife Vera Jones (hereafter collectively "the Joneses") challenge the district court's dismissal of their action brought against the City of Carlisle, Kentucky (hereafter "the City") under 42 U.S.C. § 1983. The Joneses also challenge the district court's remand to state court of their claim against defendant Preferred Risk Mutual Insurance Company (hereafter "Preferred Risk") for declaratory relief.

The Joneses claim that the appellee City of Carlisle is liable pursuant to § 1983 for money damages for the physical injuries Mr. Jones suffered in the November 13, 1990 automobile accident cause by Mark Byrd (hereafter "Byrd"), a private citizen of Kentucky. The Joneses also seek a declaration from the court that they are entitled to $100,000 on Mr. Jones' underinsured motorist policy.

The Joneses allege that the City incurred § 1983 liability for Mr. Jones' injuries when it allowed Byrd, a known epileptic prone to uncontrollable seizures, to maintain a driver's license. The Joneses also challenge Preferred Risk's position that under the terms of the underinsured motorist policy, it does not incur liability until after the policy holder obtains a judgment against the tort-feasor and the tort-feasor's insurance is insufficient to cover the insured's judgment.[1]

The district court dismissed the § 1983 claim against the City for failure to state a cause of action under Fed. R. Civ. P.

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[1]The Complaint also advanced several state tort claims against the City and Byrd.

12(b)(6). The district court found that Byrd was not acting as the agent of the City at the time of the accident, and that Mr. Jones, as distinguished from the public at large, was not placed in special danger as the result of the City's inaction and Byrd's continued activity. Further, the district court found that no special relationship existed between the City and Mr. Jones nor between Byrd and Mr. Jones which would impose upon the City a duty of care owed to Mr. Jones. The district court remanded the Joneses' declaratory judgment claim against Preferred Risk to Nicholas County, Kentucky.

II.

In evaluating the propriety of a dismissal under Rule 12(b)(6), this Court must "consider the pleadings and affidavits in a light most favorable to the plaintiff." *Welsh v. Gibbs*, 631 F.2d 436, 439 (6th Cir. 1980), *cert. denied*, 450 U.S. 981(1981) (citations omitted). Further, the factual allegations in the complaint must be treated as true. *Collins v. Nagle*, 892 F.2d 489, 493 (6th Cir. 1989). To withstand a challenge under Rule 12(b)(6), it must be established beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).[2]

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[2] The Joneses argue that the summary judgment standard identified in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), represents the applicable standard of review for the present case because certain depositions were submitted by them with their Response Brief. However, the Motions to Dismiss were not transformed into summary judgment motions because the district court specifically stated that it was granting a Rule 12(b)(6) dismissal and it is apparent from the decision that the district court did not rely on the outside evidence submitted in rendering its decision. *Atkins v. Louisville and Nashville R. Co.*, 819 F.2d 644 (6th Cir. 1987). *See, e.g., Friedman v. United States*, 927 F. 2d 259 (6th Cir. 1991).

The complaint alleges that Mark Byrd is an epileptic who has suffered from an uncontrolled seizure disorder since birth. In 1983, Kentucky issued Byrd a driver's license. Between 1983 and 1987, Byrd was involved in at least seven automobile accidents in the City of Carlisle. Each accident was allegedly caused by Byrd experiencing a seizure while driving, and each accident resulted in either property damage, personal injury, or both. The City police investigated each accident; however, no accident report was ever filed. No citation was ever issued and no law enforcement action was ever taken against Byrd.

In the accident involving Mr. Jones, Byrd, as in his other accidents, was operating a motor vehicle when he experienced an epileptic seizure. He lost control of his vehicle, crossed over the center line into the oncoming lane of traffic, and struck head-on the motor vehicle operated by Mr. Jones, who was severely and permanently injured. Byrd was never cited and no law enforcement action was taken against him as a result of this accident.

A. Section 1983 Analysis

The Joneses bring the present lawsuit claiming that the City was aware that Byrd presented a danger to motorists but took no action to revoke his driver's license. Under Kentucky statutes, law enforcement officials are required to file with the Department of State Police a written report of any motor vehicle accident resulting in personal injury or property damage. Ky. Rev. Stat. § 189.635(3). This report must also be submitted to the Kentucky State Police. Ky. Rev. Stat. § 189.635. Further, Kentucky will suspend the license of a driver upon notice from law enforcement officials that the driver is subject to epileptic seizures. 601 Ky. Admin. Regs. 13:010.

The Joneses advance three claims under 42 U.S.C. § 1983 against the City. First, they claim that it was the policy of the City both to fail to report accidents involving individuals suffering from epileptic seizures and to allow Byrd, a known epileptic prone to seizures, to maintain a driver's license and operate a motor vehicle. Second, the Joneses claim that the City's failure to train and supervise its police has caused the City Police to be inadequate to the tasks performed by them, especially as concerns the duty of the police officer as regards unfit and unsafe operators of motor vehicles. This failure to train, the Joneses allege, also results in §1983 liability attaching to the City. Third, the Joneses claim that Mr. Jones, as a citizen of the United States and of Kentucky, is entitled to the protection of the laws of both, and that the City's actions, policies, or customs deprived Mr. Jones of this entitlement. The Joneses argue that, absent these policies, individual officers would have reported the prior accidents as required under state law, Byrd's license would have been revoked, and the accident involving Mr. Jones would never have occurred.

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall...deprive any person of life, liberty, or property, without due process of law." However, the Due Process Clause does not "protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." *DeShaney v. Winnebago County Soc. Serv. Dept.*, 489 U.S. 189, 195 (1988).

In *DeShaney*, a mother and her son brought suit against a county agency claiming that it was responsible for the brutal beating the son received at the hands of his father.

After a divorce, the court had awarded custody of the boy to his father. On numerous occasions, the boy was brought to the emergency room with injuries that suggested child abuse. Further, the defendant agency was made aware of these suspicious injuries. Nonetheless, the agency took no steps to protect the boy from his abusive father. The child was eventually beaten so severely by his father that he suffered permanent brain damage.

The Court held that the defendant agency did not violate the son's due process rights because the boy's injuries were caused by a private actor, and that the agency had no control over the father. The Court noted that the agency did not cause the injuries and there was no special relationship between the boy and the agency or between the father and the agency which would trigger an obligation to take affirmative action to prevent future abuse. According to the *DeShaney* Court, the fact that the defendant agency was aware of the potential danger was not sufficient to impose a duty to act.

In the earlier case of *Martinez v. California*, 444 U.S. 277 (1980), the Court held that the state officials were not liable when a parolee murdered a fifteen year old girl. The Court found that the officials did not cause the crime, that the parolee was not acting as an agent of the state, and that the victim did not face any special danger apart from the rest of society.

The Sixth Circuit has also applied the analysis employed in *DeShaney*. In *Janan v. Trammell*, 785 F.2d 557 (6th Cir. 1986), a case filed two years prior to *DeShaney*, a boy was murdered by a parolee. The boy's family brought suit against the Parole Board claiming that it was aware of the parolee's dangerous propensities and had a duty to protect society from him. The court held for the Parole Board, finding no

duty to protect the victim from the parolee. The court first noted that the parolee was not a state officer acting under color of state law. The court then announced the rule to be applied in the Sixth Circuit regarding injuries suffered and damages incurred at the hands of private actors:

> [T]he proper analysis is whether a special relationship exists between the criminal and the victim or between the victim and the state or whether there is some showing that the victim, as distinguished from the public at large, faces a special danger by the parolee's release. In so holding, we follow other circuits that have held that absent a special relationship between the criminal and the victim or the victim and the state, no due process violation can occur.

Id. at 560 (citations omitted). See also *Cornelius v. Town of Highland Lake,* ALA, 880 F.2d 348 (11th Cir. 1989).[3]

A due process violation was found in *Nishiyama v. Dickson County, Tenn.*, 814 F.2d 277 (6th Cir. 1987), where a county prisoner was entrusted with a patrol car for his private use, absent any supervision. While driving the police car, the prisoner used the flashing blue light to pull over the

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[3] Here the city was liable for violating a city clerk's due process rights when it initiated a work program where prisoners performed manual labor around the City Hall grounds. On one particular day, the city clerk was abducted by two of the prisoners working on City Hall grounds who were not eligible for work release, but were accidentally allowed to participate. The court held that there was a special relationship between the city clerk and the city as she was obligated to work in the same area where the city had determined it would initiate the prisoner work program. The court also found a special custodial relationship between the city and the prisoners. Further, the court found that the plaintiff clerk faced a special danger separate from the remainder of the community because she was constantly in contact with the prisoners from the work program.

decedent's car and then beat her to death. At trial, it was determined that it was the policy of the Sheriff's Department to allow the prisoner to drive the car unsupervised. It was also determined that the Sheriff was aware that the prisoner had been using the patrol car to pull motorists off the road for several hours before the victim was killed but did nothing to stop this conduct.

The court found a special relationship between the defendant Sheriff's Department and the prisoner, as the prisoner was being held in custody, albeit with substantial privileges. Further, the court noted that, unlike *Martinez and Janan*, the defendants put into motion the actions which eventually caused the victim's death. The court observed that "the officers gave [the prisoner] the car and the freedom to commit the crime." *Id.* at 281 (emphasis in original).

Unlike the defendant in *Nishiyama*, the City of Carlisle did not cause plaintiff's injuries; the injuries were caused by Byrd, a private individual. Byrd was not acting as the agent of the City, nor was there a special relationship between the City and Byrd or between the City and Mr. Jones.[4] Further, while Byrd was a definite danger behind the wheel of a motor vehicle, he was no more a danger to Mr. Jones than to any other citizen on the City streets. Finding that the Joneses

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[4] The Joneses argue that *DeShaney* does not impose upon the claimant the showing of a special relationship between the City and the tort-feasor or the City and the claimant. We read *DeShaney* to hold that in some circumstances the Constitution imposes upon the State an affirmative duty of care and protection based upon the relationships between the State and the parties. However, the *DeShaney* Court specifically found that no special relationship existed between DeShaney and the defendant agency or between the abusive father and the agency, and affirmed the dismissal of the petitioners' § 1983 action on those grounds.

have failed to establish a special relationship required to invoke the due process protection of the Fourteenth Amendment, the district court was correct in granting the City's motion to dismiss the Joneses' § 1983 claim based on an alleged policy of not submitting accident reports in cases involving epileptic seizures.

In support of their claim of failure to train, the Joneses cite *Canton v. Harris*, 489 U.S. 378 (1989). In *Harris*, police officers failed to provide the plaintiff with medical attention once she was taken into custody. The Court found a due process violation because of the special relationship that the plaintiff and the city had based upon the custody of the plaintiff. However, the Court noted that "a municipality can be liable under § 1983 [for a failure to train] only where its policies are the 'moving force [behind] the constitutional violation.'" *Id.* at 389 (citation omitted).

As the district court held, the Joneses' reliance on *Harris* is misplaced. It is true that the Supreme Court in *Harris* held that a municipality may be liable under § 1983 for failure to train or supervise law enforcement officials where such failure constitutes "deliberate indifference" to the rights of an individual. However, the analysis of a §1983 failure to train claim does not stop there. As the *Harris* Court noted, to prevail, a §1983 plaintiff must demonstrate that the policy "actually cause[d] injury." *Id.* at 390. In *Harris*, the plaintiff suffered injury at the hands of a state actor. In contrast, Mr. Jones' injuries were caused by a private actor. While the City did nothing to prevent Byrd from driving, this inaction was not the "moving force" behind Mr. Jones' injuries. His injuries were directly caused by the epileptic seizure Byrd experienced while he was operating his vehicle. As a result, the Joneses' § 1983 claim of failure to train or supervise was appropriately dismissed by the district court.

The district court also appropriately dismissed the Joneses' "entitlement" claim against the City. This claim that Mr. Jones was entitled to the protection of the laws of the United States and Kentucky represents nothing more than a "failure to protect" claim under the Fourteenth Amendment. As previously noted, the *DeShaney* Court definitively held that while the Due Process Clause of the Fourteenth Amendment prevents a State from depriving individuals of life, liberty, or property without due process of law, it does not impose upon the State an affirmative obligation to protect private individuals from the conduct of other private citizens. *DeShaney, supra* at 195.

As the *DeShaney* Court observed, this type of § 1983 analysis often renders harsh results, especially when innocent individuals suffer injuries while local governments stand idly by. *DeShaney, supra* at 203. However, this Court, like the *DeShaney* Court, is unable to extend the reach of the Due Process Clause of the Fourteenth Amendment to cover common law tort actions between private citizens.

B. Declaratory Judgment Analysis

The Joneses also challenge the district court's decision to remand their declaratory judgment action against Preferred Risk to Nicholas County. In remanding to state court, the district court noted that it has discretion determining whether to hear an action for declaratory relief. 28 U.S.C. § 2201. *Grand Trunk W. R.R. Co. v. Consolidated Rail Corp.*, 746 F.2d 323 (6th Cir. 1984).

The Joneses do not challenge the district court's remand of their action for declaratory judgment, recognizing the court's discretion. *Allstate Ins. Co. v. Mercier*, 913 F.2d 273 (6th Cir. 1990). However, the Joneses contend that the

district court failed to consider their second cause of action against Preferred Risk, that being a diversity action for money damages, arguing that a federal district court should not refuse to hear a claim where the elements of diversity jurisdiction have been met. *Meredith v. City of Winter Haven*, 320 U.S. 228 (1943).

A review of the Complaint reveals that the Joneses did not plead a cause of action against Preferred Risk separate and apart from their declaratory judgment claim. While the Complaint makes reference to the $100,000 insurance the Joneses allege they are entitled to, the prayer merely seeks a declaration that they are entitled to that amount. The reference to the specific amount of $100,000 is made merely to define the content of the declaration.

The argument that the Joneses advanced two separate causes of action against Preferred Risk is further belied by the Joneses' postjudgment Motion to Alter, Amend, or Vacate filed with the district court, (Docket Nos. 46, 47). In addition to objecting to the dismissal of the §1983 claim against the City, the Joneses challenged the remand of the declaratory judgment claim without indicating to the district court that their complaint could be construed to include a diversity action against Preferred Risk separate and apart from their declaratory judgment claim.[5]

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[5] The Joneses filed a supplemental motion in which they identified a recent Kentucky Supreme Court decision which expanded the rights of insureds to obtain underinsured motorist coverage in the event that they settle with the tort-feasor. *Coots v. Allstate Ins. Co.*, 853 S.W.2d 895 (Ky. 1993). The *Coots* decision has no bearing on the present action as the claim for damages was never before the district court.

The declaratory judgment action against Preferred Risk was originally filed in district court. It was consequently improper for the district court to remand it to a state court. Therefore, the Joneses' declaratory judgment action is remanded to the district court for entry of an order of dismissal without prejudice.[6]

III.

For the reasons stated above, the judgment of the district court is AFFIRMED IN PART and REMANDED IN PART for entry of an order consistent with this opinion.

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[6] This Court observes that having disposed of the federal claims, it was also within the district court's discretion to dismiss the remaining pendent state claims against Byrd and the City. Pendent jurisdiction "is a doctrine of discretion, not of plaintiff's right." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966).

Eastern District of Kentucky
FILED JUN 12 1992
at Ashland
LESLIE G. WHITMER
Clerk, U.S. District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 91-516

JAMES RICKY JONES and
VERA JONES, PLAINTIFFS,

AND

AIK SELECTIVE
SELF INSURANCE, INTERVENING PLAINTIFF,

VS.

CITY OF CARLISLE,
KENTUCKY, et. al., DEFENDANTS.

MEMORANDUM OPINION AND ORDER

In November of 1990, a vehicle being operated by defendant Mark Byrd crossed the center line and collided head-on with a vehicle being operated by plaintiff James Jones, who was seriously and permanently injured. The accident was apparently caused because Byrd experienced a seizure while driving which resulted in Byrd losing control of the vehicle and crossing over the center line. Byrd is an epileptic who is subject to uncontrolled seizures. Allegedly, since 1983, Byrd has been involved in seven automobile accidents in the City of Carlisle and in Nicholas County, all of which resulted in some sort of property damage or personal injury, and all of

which were caused by the fact that Byrd experienced an epileptic seizure while driving. Normally, under 601 Kentucky Administrative Regulations 13:010, the Commonwealth of Kentucky will suspend the license of a driver upon notice from law enforcement officials that the driver is subject to epileptic seizures. However, Byrd's license was never suspended and was valid at the time of the accident that is the subject of this suit. Plaintiffs allege that the Commonwealth was not properly informed of Byrd's epileptic condition because, though the Carlisle Police Department knew of Byrd's many accidents, he was never issued a citation and only on one occasion was a police report filed. Further, plaintiffs allege that it was the deliberate policy of the Carlisle Police Department not to report all of Mark Byrd's motor vehicles accidents[1] and to allow Byrd to operate a motor vehicle even though it was known that Byrd was an unsafe driver. Plaintiffs conclude that these actions by the Carlisle Police Department constitute a deprivation of the liberty of James Jones without due process of law in violation of the Fourteenth Amendment.[2]

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[1] Under K.R.S. § 189.635, police officers are required to file written reports of motor vehicle accidents which render any vehicle inoperable or cause personal injury.

[2] Plaintiffs have filed a motion to amend their complaint in order to allege that the City also violated James Jones' rights under the Fifth Amendment. However, the Fifth Amendment is not directed to the states or state entities, but solely to the federal government. *Palko v. Connecticut*, 302 U.S. 319, 322, 58 S.Ct. 149, 82 L.Ed. 288 (1937). Thus, a Fifth Amendment due process claim adds nothing to a plaintiff's Fourteenth Amendment due process claim against a state entity. See *Popow v. City of Margate*, 476 F. Supp. 1237, 1242 n. 2 (D.N.J. 1979); *Flowers v. Webb*, 575 F. Supp. 1450, 1456-1457 (E.D.N.Y. 1983). For this reason, the motion to amend the complaint will be denied.

Plaintiff James Jones has brought this action pursuant to 42 U.S.C. § 1983 against the City of Carlisle, and seeks damages for the City's alleged deprivation of his constitutional rights. Plaintiff Vera Jones, the wife of James, seeks recovery against the City for loss of consortium. Also, plaintiffs have advanced pendent tort claims against the City and against defendant Byrd.

Defendant Preferred Risk Mutual Insurance Co. (Risk Mutual) sold underinsured motorist coverage to the plaintiffs prior to the accident. Byrd's automobile liability insurance is allegedly insufficient to compensate the plaintiffs for their losses. Plaintiffs seek a declaration of Risk Mutual's liability to them for the full amount of their underinsured motorist coverage, which plaintiffs allege is $100,000.00 per person. Risk Mutual acknowledges coverage, but claims that the liability limit on the underinsured motorist coverage provided to plaintiffs is $50,000.00. Therefore Risk Mutual has filed a counterclaim against plaintiffs seeking a declaration that the limit is $50,000.00

AIK Selective Self Insurance Fund (AIK) has been allowed to intervene as a third party plaintiff in order to assert claims against the City of Carlisle and Byrd. According to the intervening complaint, plaintiff James Jones was acting in the scope of his employment with Baumann Paper Company (not a party in this suit) when Byrd collided with him. AIK is the workers' compensation insurance carrier for Baumann Paper Company and has paid temporary total disability benefits to James Jones and will allegedly incur further expense in the future. In the event that Byrd and/or the City of Carlisle are found liable in this case, AIK seeks to recover the amount of indemnity paid and owing on behalf of James Jones.

The City of Carlisle has filed a crossclaim against Byrd, and Risk Mutual has filed crossclaims against Byrd and the City. Both the City and Risk Mutual seek judgment against their respective crossclaim defendants in the amount of any judgment which may be rendered against them in favor of the plaintiffs.

It should also be noted that in February of 1991 (nine months before the initiation of the present action, which was filed in November of 1991), plaintiff filed a suit in Nicholas Circuit Court against Byrd and Risk Mutual. In November of 1991 (at the same time the present suit was filed), the state complaint was amended to add the City of Carlisle as a defendant. The allegations in the Nicholas Circuit Court are essentially identical to the allegations made in this Court.

This matter is currently before the Court on several motions. The motion of the City to dismiss the complaint will be first addressed.

The City of Carlisle argues that where a plaintiff was deprived of liberty by an independent actor who has no special connection the State,[3] it cannot be said that the State violated the Fourteenth Amendment. It is undisputed that Byrd was in no way affiliated with a state entity, and that Byrd was the most proximate cause of the plaintiffs' injuries. The City thus concludes that since a § 1983 action is predicated on some deprivation of constitutional rights by a State entity[4], plaintiffs' § 1983 claims must be dismissed. To

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[3] The term "State" refers generally to state and local governmental entities and their agents who are prohibited under the Fourteenth Amendment from depriving a person of liberty without due process of law.

[4] "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State... subjects, or causes to be subjected, any citizen of the United States... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." 42 U.S.C. § 1983.

support this conclusion, the City has cited several cases that merit examination.

In *Martinez v. State of Cal.*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed. 2d 481(1980), a convicted rapist was paroled by the State of California, contrary to the direction of the sentencing court, which recommended that he should not be paroled. Five months after his release, the parolee murdered a young girl. The girl's survivors brought a § 1983 action claiming that the California officials responsible for the parole-release decision deprived the girl of her life in violation of the Due Process Clause of the Fourteenth Amendment. Though it was accepted that the officials knew or should have known that the release of the parolee would create a clear and present danger that the parolee would commit a violent crime, the Supreme Court affirmed the trial court's dismissal of the case. In reaching this conclusion it was recognized that the Due Process Clause of the Fourteenth Amendment protects a person only from deprivation by the *"State* . . . of life . . . without due process of law." *Id.* at 284 (emphasis in original). The Court concluded that the crime of the parolee, committed after his release, could not be characterized as State action and thus, California could not be held liable for the girl's murder. *Id.* at 285. Even if the parole board was negligent or wanton in allowing the release of the rapist, the action by the parolee after his release "cannot be fairly characterized as state action." *Id.*

This approach to §1983 claims based on injury caused by a private third party was expanded upon by the Sixth Circuit in *Janan v. Trammell*, 785 F. 2d 557 (6th Cir. 1986). A convicted armed robber was paroled by the Tennessee State Parole Board and two months later murdered Janan. Janan's family sued the Parole Board in a § 1983 action alleging gross negligence. The Sixth Circuit held that a §

1983 action could be maintained against the State for injuries caused by a private third party if "a special relationship exists between the criminal and the victim or between the victim and the state or whether there is some showing that the victim, as distinguished from the public at large, faces a special danger by the [State action]." *Id.* at 560. However, absent such special relationship, "no due process violation can occur," such that unless the State places a person in special danger, "there is no constitutional right to be protected by the state against being murdered by criminals or madmen." *Id.* citing *Bowers v. DeVito*, 686 F. 2d 616, 618 (7th Cir. 1982). The Sixth Circuit found no special relationship between the State and Janan nor between Janan and the parolee and thus affirmed the dismissal of the §1983 claims.

In the recent case of *DeShaney v. Winnebago Co. Dept. of Social Services*, 489 U.S. 189,109 S.Ct. 998,103 L.Ed. 2d 249 (1989), the Winnebago County (Wisconsin) Department of Social Services had received complaints about physical abuse by DeShaney's father. Despite these complaints and despite the presence of physical evidence that DeShaney was being abused, the County failed to remove DeShaney from his father's custody. Finally, DeShaney was beaten so severely that he sustained permanent brain damage. DeShaney and his mother sued Winnebago County under §1983 claiming that the County's failure to act deprived the boy of his liberty in violation of the Due Process Clause. In affirming the dismissal of the suit, the Supreme Court stated that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *Id.* at 195. The Court concluded that "the State had no constitutional duty to protect [DeShaney] against his father's violence, [and] its failure to do so — though calamitous in hindsight — simply

does not constitute a violation of the Due Process Clause." *Id.*

In response to the motion to dismiss, and to the holdings in *Martinez*, *Janan*, and *DeShaney*, plaintiffs argue that their cause of action is based on the City's alleged failure to train its police officers as to the proper procedures for reporting traffic accidents. Plaintiffs assert that it was the policy of the City of Carlisle not to train its police officers and the adoption of such a policy renders the City liable under §1983 pursuant to a theory of municipal liability. Numerous cases are cited to support this proposition. These cases reveal that generally, a city can be liable under §1983 for failing to train its employees if such failure to train may fairly be said to represent a policy," however, it must also be shown that the policy "actually causes injury." *Canton v. Harris*, 489 U.S. 378, 390, 109 S.Ct. 1197, 103 L.Ed. 2d 412 (1989).

Most of the cases cited by plaintiff, for the proposition that a City can be liable under §1983, are easily distinguishable from the present case by the fact that the injury to the plaintiff was caused directly by the action of a *municipal employee*.[5] In these cases where the proximate cause of the

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[5]The cases distinguishable on this point are *Canton*, (alleged failure by police officers to provide necessary medical care to plaintiff who was in custody); *Kibbe v. City of Springfield*, 777 F.2d 801 (1st Cir. 1985)(police officer accused of using deadly force when such was not justified); *Wierstak v. Heffernan*, 789 F.2d 968 (1st Cir. 1986)(police officer accused of using excessive force); *Rymer v. Davis*, 775 F. 2d 756 (6th cir. 1985)(police officer accused of using excessive force); *Warren v. City of Lincoln*, Neb., 816 F. 2d 1254 (8th Cir. 1987)(alleged arrest without probable cause); *Fiacco v. City of Rensselaer*, N.Y., 783 F. 2d 319 (2d Cir. 1986)(police officer accused of using excessive force); *Spell v. McDaniel*, 824 F. 2d 1380 (4th Cir. 1987)(police officer accused of using excessive force); *Rock v. McCoy*, 763 F. 2d 394 (10th Cir. 1985)(police officer accused of using excessive force).

plaintiff's injuries is shown to be a city's failure to train its employees, a § 1983 claim is cognizable. In the present case, a private individual was the proximate cause of the plaintiffs' injuries. In such situations, as in *Martinez, Janan, and DeShaney*, the general rule is that the State is not liable under §1983 for the deprivations caused by the private individual. However, plaintiffs have also cited authority contrary to this general rule of non-liability; and it is these cases that merit discussion.[6]

In *Wood v. Ostrander*, 879 F. 2d 583 (9th Cir. 1989), *cert. denied* ___ U.S. ___, 111 S.Ct. 341, 112 L.Ed. 2d 305 (1990), Washington State Trooper Ostrander pulled over and arrested a drunk driver in the Parkland area of Pierce County, Washington; an area with a high rate of aggravated criminal activity. Ostrander also impounded the drunk driver's car, which left Wood, who was the driver's female passenger, without transportation. After refusing assistance from Ostrander, Wood undertook a five-mile walk home, at 2:30 a.m., through the Parkland area. Before reaching her home, Wood was picked up by an unknown driver who took her to a secluded area and raped her. The Ninth Circuit allowed a § 1983 suit by Wood against Ostrander after reasoning that "[t]he fact that Ostrander arrested [the driver], impounded his car, and apparently stranded Wood in a high-crime area

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[6]Two other cases cited by plaintiffs can be deemed inapplicable without lengthy discussion. In *Fisher v. City of Cincinnati*, 753 F. Supp. 681 (S.D. Ohio 1990), Fisher claimed a constitutional deprivation by the City of Cincinnati of the right to access to the courts in violation of the First Amendment. This is a substantive right that is "independent of the Fourteenth Amendment due process clause." *Id.* at 687-688. Also *Gregory v. City of Rogers, Ark.*, 921 F. 2d 750 (8th Cir. 1990), has been vacated by the Eighth Circuit at 939 F. 2d 524 (8th Cir. 1991), and cannot be cited as a valid authority.

at 2:30 a.m. distinguishes Wood from the general public and triggers a duty of the police to afford her some measure of peace and safety." *Id.* at 590.

In *Cornelius v. Town of Highland Lake Ala.*, 880 F. 2d 348 (11th Cir. 1989), *cert. denied* 494 U.S. 1066, 110 S.Ct. 1784, 108 L.Ed. 2d 785 (1990), the Mayor of the Town of Highland Lake requested that the Alabama Department of Corrections provide the City with inmate labor for general maintenance of the town hall building and grounds. Two of the work squad inmates, working in and around the town hall, abducted the Highland Lake Town Clerk from the town hall, stole her car, and forced her to accompany them on a three state flight during which time they terrorized her. The Eleventh Circuit allowed a § 1983 action by the clerk against the town by finding that the State had the power and authority to direct the actions of the inmates and that a responsibility thereby was imposed on the State. *Id.* at 356. Further, because the clerk and the State "stood in a special relationship to one another", the responsibility of the State was to protect the clerk from the inmates whom it controlled and whom the State placed in the proximity of the clerk. *Id.*

Both of these cases present a situation where the State, by an affirmative exercise of its power, has acted upon a specific individual, and made that individual less capable of caring for him or herself and more vulnerable to a specific danger. Such State created limitation on an individual's ability to care for himself creates a corresponding State duty to provide for that individual's reasonable safety. *DeShaney*, at 200; *Janan* at 560.

However, in the present case, even if the City of Carlisle knew of the dangers that Byrd presented to the general public, the City played no part in the creation of such danger,

nor did it do anything to render the plaintiffs more vulnerable to that danger. Under such circumstances, the State has no duty to members of the general public who are injured as a result of actions by third parties, even when the State indirectly facilitated those actions. *DeShaney* at 201; *Martinez* at 284-285.

This must be so because:

> "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security."
>
> "[The Fourteenth Amendment] forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means."

Id. at 195. It is only through certain affirmative actions taken by the State towards individuals that a duty may be created in the State to assume responsibility for that individual's safety and general well-being. *Id.* at 200. The victim, as opposed to the general public, must face some special danger as a result of State action. *Janan*, at 560. In the present case, the City of Carlisle has taken no affirmative actions towards the plaintiffs and thus had no duty to assume responsibility for the plaintiffs' safety.

The case of *Gibson v. City of Chicago*, 910 F. 2d 1510 (7th Cir. 1990) does not require a different result. Gibson's survivor brought a § 1983 action against the City after Gibson was shot and killed by a police officer who had been placed on the

medical roll as mentally unfit for duty. Although the police officer was relieved of all of his police powers, the City failed to confiscate his firearm, which he used to kill Gibson. The Seventh Circuit found that the police department "affirmatively trained and outfitted one of its employees with the means to exercise deadly force, yet failed to recover that equipment from its employee after it had determined that the employee was unfit to exercise police authority." *Id.* at 1522 n. 19. Even though it was found that the police officer was not acting in the scope of his employment but was instead acting as a private individual, the § 1983 action was allowed, because the State, through the police department, played a significant role in creating the danger to the victim. *Id.* at 1519. This case therefore differs from the others cited by plaintiffs in that no special relationship existed between the State and the victim. Instead, the special relationship existed between the State and the police officer, who was viewed in the posture of a private individual. It was because of this special relationship that the Seventh Circuit distinguished *Martinez*, and *DeShaney* and permitted the §1983 claim against the State.

Plaintiffs would have this Court apply the rationale of the Seventh Circuit to the present case.[7] Even if this Court were inclined to adopt the position of the Seventh Circuit, *Gibson* would be inapplicable to the present case. The relationship between the State and the police officer, which was essential to the holding in *Gibson*, is not analogous to the relationship between Byrd and the City of Carlisle. Carlisle cannot be said to have "created the danger" as was done by

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[7] The Sixth Circuit has not adopted the approach taken by the Seventh Circuit, and for this reason alone, this Court would decline to apply *Gibson*.

the City of Chicago in *Gibson*. *Id*. at 1521 n. 19. The most that can be said of the relationship between Byrd and the City of Carlisle is that the Carlisle Police purposefully allowed Byrd to continue operating a motor vehicle. State allowance of a private citizen's continuation of known dangerous behavior did not, for the Supreme Court in *DeShaney*, create a duty in the State to protect against that danger, and this Court cannot view the same situation differently.

No special relationship existed between the City and the plaintiff nor between Byrd and the plaintiffs. Also, Carlisle took no affirmative action that placed the plaintiffs in special danger as compared to the general public. Finally, no relationship existed between the City and Byrd such that the City can be said to have created the dangers that Byrd presented. Under such circumstances plaintiffs' § 1983 must be dismissed.

If this seems a harsh result[8], it should be remembered that dismissal of the § 1983 claims against the City in no way forecloses any liability of the City under theories of state tort law.[9] Dismissal of the §1983 claims merely comports with the rule that the Fourteenth Amendment does not transform every tort committed by a State actor into a constitutional violation. *DeShaney* at 202.

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[8] Although the recognition that plaintiffs have no cause of action under § 1983 does not produce in the present case so harsh as was seemingly produced in *Martinez*, *Janan*, and *DeShaney*.

[9] Claims almost identical to those raised in this suit are pending before the Nicholas Circuit Court. This state case is further along than the present case (twenty-five depositions have been taken in the Nicholas County case as compared to one deposition in the present case).

In its motion to dismiss, the City of Carlisle also argues that if the Court dismisses plaintiffs' § 1983 claims, then the remainder of the complaint, which consists mainly of pendant state claims, should also be dismissed for lack of subject matter jurisdiction. "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine - judicial economy, convenience, fairness, and comity - will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n. 7, 108 S.Ct. 614, 98 L.Ed. 2d 720 (1987).

Plaintiffs respond that along with their § 1983 claims, they have asserted claims against Risk Mutual for a declaratory judgment on the issue of the amount of coverage under the underinsured motorist policy. Thus, it is plaintiffs' position that even if the §1983 claims are dismissed, there remains before the Court a declaratory judgment action, and the lawsuit should not be completely dismissed.

Pendent jurisdiction "is a doctrine of discretion, not of plaintiff's right." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed. 2d 218 (1966). This Court will comply with the recommendation of the Supreme Court when it stated that where "state issues substantially predominate, whether in terms of proof, [or] of the scope of the issues raised," a federal court should normally relinquish jurisdiction to the appropriate state court. *Carnegie-Mellon Univ.*, at 350 n. 7. The declaration of rights sought by plaintiffs against Risk Mutual does not alter this Court's discretion. The Supreme Court has made it clear that federal courts should exercise their discretion when determining the propriety of issuing a declaratory judgment. *Eccles v. Peoples Bank*, 333 U.S. 426, 431, 68 S.Ct. 641, 92 L.Ed. 784 (1948).

The Declaratory Judgment Act, 28 U.S.C. § 2201, confers no absolute right upon a litigant. *Green v. Mansour*, 474 U.S. 64, 72, 106 S.Ct. 423, 88 L.Ed. 2d 371 (1985) (quoting *Public Service Comm'n v. Wycoff Co.*, 344 U.S. 237, 241, 73 S.Ct. 236, 97 L.Ed. 291(1952)).

It is this Court's judgment that adjudication of all claims in the Nicholas Circuit Court advances the interests of judicial economy, convenience, and comity. Thus, all remaining claims will be remanded to the Nicholas Circuit for appropriate disposition.

This ruling makes moot all other pending motions: the City of Carlisle's motion for abstention, plaintiffs' motion for a hearing, and plaintiffs' motion to file a reply to the reply of the City.[10]

Accordingly,

IT IS THEREFORE ORDERED AND ADJUDGED:

(1) That the motion of the City of Carlisle to dismiss all § 1983 claims is GRANTED, that the § 1982 claims are DISMISSED, and plaintiffs shall take nothing thereby;

(2) That the motion of the City of Carlisle to dismiss all remaining claims for lack of subject matter jurisdiction is GRANTED and all remaining claims shall be REMANDED to the Nicholas Circuit Court for appropriate disposition;

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[10] Plaintiffs sought to file a reply to the reply in order to respond to the case of *Nishiyama v. Dickson County, Tenn.*, 814 F. 2d 277 (6th Cir. 1987), cited for the first time in the reply of the City. This case was not necessary to the disposition of the City's motion and this, a reply by plaintiffs in unnecessary.

(3) That the motion of the City of Carlisle for abstention is DENIED as MOOT;

(4) That plaintiffs' motion to amend their complaint is DENIED;

(5) That plaintiffs' motion for a hearing is DENIED as MOOT;

(6) That plaintiffs' motion to file a reply is DENIED as MOOT;

(7) That this matter is DISMISSED and shall be STRICKEN from the docket;

This 12 day of June, 1992.

/s/ HENRY R. WILHOIT, JR., JUDGE

Eastern District of Kentucky
FILED JUL 21 1992
at LEXINGTON
LESLIE G. WHITMER
Clerk, U.S. District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 91-516

JAMES RICKY JONES and
VERA JONES, PLAINTIFFS,

AND

AIK SELECTIVE
SELF INSURANCE INTERVENING PLAINTIFF,

VS.

CITY OF CARLISLE,
KENTUCKY, et al., DEFENDANTS.

ORDER

This case was dismissed, pursuant to the Memorandum Opinion and Order of this Court, on June 12, 1992. Plaintiffs have filed a motion to alter, amend or vacate the June 12th Opinion along with a motion for oral argument. Plaintiffs have also filed a motion for permission to file an amended complaint. The facts of this matter are set out in the June 12th Opinion and will not be restated here.

In plaintiffs' motion to alter, amend or vacate, they state that their complaint was dismissed on the ground that no "special relationship" exists between Mark Byrd and defendant City of Carlisle. Plaintiffs argues that dismissal on

these grounds was erroneous because the "special relationship" analysis was rejected by the Supreme Court in *DeShaney v. Winnebago Co. Dept. of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed. 2d 249 (1989). Both of these assertions by plaintiffs are mistaken.

The Court in DeShaney did not reject the special relationship analysis but merely decided that no special relationship existed under the facts of the case. See *Id.* at 197-199 Likewise, this Court found that there was no special relationship in the present case. This, however, was not the whole of this Court's holding, but merely a component. This Court went on to find that "Carlisle took no affirmative action that placed the plaintiffs in special danger as compared to the general public" and that the City cannot be said to have "created the dangers that Byrd presented." Under these circumstances, this Court is bound to apply the rulings of the Supreme Court and hold that "the State had no constitutional duty to protect [the plaintiffs]." *Id.* at 201.

Plaintiffs also argue that even if their §1983 claims are dismissed, their declaratory judgment action, based on diversity of citizenship, should not have been dismissed. Plaintiffs go on to state that their claims of state tort liability "will have to be tried to resolve the declaratory judgment proceeding and the ensuing claims of Preferred Risk." It is precisely for this reason that this Court must decline to hear plaintiff's claims for declaratory judgment. See *Allstate Ins. Co. v. Mercier*, 913 F. 2d 273 (6th Cir. 1990).

Accordingly,

IT IS THEREFORE ORDERED AND ADJUDGED:

(1) That plaintiff's motion to alter, amend or vacate this Court's Memorandum Opinion and Order of June 12, 1992 is DENIED;

(2) That plaintiff's motion for an oral argument is DENIED;

(3) That plaintiff's motion for leave to file its tendered amended complaint is DENIED as MOOT.

This 20 day of July, 1992

/s/ HENRY R. WILHOIT, JR. JUDGE

FILED
OCT 13 1993
LEONARD GREEN, CLERK

NO. 92-6103

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES RICKY JONES,
VERA JONES,
Plaintiffs-Appellants,

AIK SELECTIVE SELF
INSURANCE FUND,
Intervenor

v.

ORDER

CITY OF CARLISLE, KENTUCKY;
PREFERRED RISK MUTUAL INSURANCE
COMPANY; MARK BYRD,
Defendants-Appelleses

BEFORE: GUY and SUHRHEINRICH, Circuit Judges; and DOWD,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel

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* Hon. David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

APPENDIX B

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

U.S. Const. Amend. XIV, Section 1

42 U.S.C. Section 1983

Kentucky Revised Statute Section 95.015 (Michie ed.)

Kentucky Revised Statute Section 95.710 (Michie ed.)

Kentucky Revised Statute Section 95.760 (Michie ed.)

Kentucky Revised Statute Section 95.740 (Michie ed.)

Kentucky Revised Statute Section 186.570 (Michie ed.)

Kentucky Revised Statute Section 189.290 (Michie ed.)

Kentucky Revised Statute Section 189.635 (Michie ed.)

Kentucky Revised Statute Section 431.450 (Michie ed.)

601 Kentucky Administrative Regulation 13:010

U.S. CONSTITUTION AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suits in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Ky. Rev. Stat. § 95.015. Rights and duties of police and fire fighters – Members of the police and fire departments in cities and urban-county governments shall abide by and adhere to the rules, regulations and laws set forth by the Kentucky Revised Statutes, and the legislative body of the city in which they are employed, provided, that no such rule, regulation or law shall apply that alters, abridges or otherwise restricts the constitutional rights of said members and

said members, except when on duty, shall not be restrained from exercising their rights and privileges or from entering into any endeavor enjoyed by all other citizens of the city in which they reside.

Ky. Rev. Stat. § 95.710. Qualifications of members of police and fire departments. – To be eligible for appointment as a member of the police force or fire department of a city of the fourth or fifth class, except cities of the fourth class which have adopted KRS 95.761 to 95.784, a person must be a resident of the county, at least twenty-one (21) years of age, able to read and write the English language intelligibly, and sober, moral and sagacious. No person who has been convicted of a felony is eligible for appointment. After appointment no member shall interfere in any election.

Ky. Rev. Stat. § 95.760. Oath of policemen. – In cities of the fourth and fifth classes except cities of the fourth class which have adopted KRS 95.761 to 95.784, every member of the police force shall take an oath to faithfully perform the duties of his office, and that he possesses the required qualifications. In cities of the fourth class the oath shall also provide that he will not interfere in any election.

Ky. Rev. Stat. § 95.740. Powers of chief of police and policemen – Fees – Deputies – Special police. – (1) The chief of police and every member of the police force in cities of the fourth and fifth classes may, whether directed to them or not, execute warrants of arrest, processes, subpoenas and attachments for witnesses. They may arrest as prescribed by law for offenses against ordinances or municipal regulations

of the city, and shall have the same power of arrest for offenses against the state as a sheriff.

(2) The chief of police and members of the police force shall be entitled to the same fees, and the same remedies for collecting them, that are allowed by law to sheriffs and other officers for similar services, but the city legislative body may, by ordinance, direct that the fees be paid into the city treasury when the chief of police and members of the police force are employed on a salary.

(3) The chief of police may appoint deputies, by and with the advice and consent of the city legislative body, who shall have the same powers and duties as the chief of police except that they shall not command the police force.

(4) The chief of police may appoint special or extra police, by and with the advice of the mayor. These special or extra police, appointed for less than a week, shall take the oath prescribed by law but shall not be required to execute bond.

Ky. Rev. Stat. § 186.570. Suspension or denial of license; hearing; surrender of certificate

(1) The cabinet or its agent designated in writing for that purpose may deny any person an operator's license or may suspend the operator's license of any person, or, in the case of a nonresident, withdraw the privilege of operating a motor vehicle in this state, subject to a hearing and with or without receiving a record of conviction of that person of a crime, whenever the cabinet has reason to believe that:

(a) That person has committed any offenses for the conviction of which mandatory revocation of a license is provided by KRS 186.050.

(b) that person has, by reckless or unlawful operation of a motor vehicle, caused or contributed to an accident resulting in death or injury or serious property damage.

(c) That person is afflicted with mental or physical infirmities rendering it unsafe for him to drive upon the highways.

(d) That person is an habitually reckless or negligent driver of a motor vehicle or has committed a serious violation of the motor vehicle laws.

(e) That person has been issued a license without making proper application for it, as provided in KRS 186.412 and regulations properly issued pursuant to it.

(f) A person required by KRS 186.480 to take an examination has been issued a license without first having passed the examination.

(g) That person has been convicted of assault and battery resulting from the operation of a motor vehicle.

(h) That person has failed to appear pursuant to a citation or summons issued by a law enforcement officer of this Commonwealth or any other jurisdiction.

(2) The cabinet or its agent designated in writing for that purpose shall provide any person subject to the suspension, revocation or withdrawal of their driving privileges, under provisions of this section, a hearing. Upon determining that such action is warranted, the cabinet shall notify the person in writing by mailing the notice to the person by first class mail to the last known address of the person. Such hearing shall be automatically waived if not requested within twenty (20) days after the cabinet mails the notice. The hearing shall be scheduled as early as practical within not to exceed twenty (20) days after receipt of such request at a time and place designated by the cabinet.

(3) The cabinet may suspend the operator's license of any resident upon receiving notice of the conviction of that person in another state of an offense there which if committed in this state would be grounds for the suspension or revocation of an operator's license. If a person so convicted is not the holder of a Kentucky operator's license, the cabinet shall deny him a license for the same period as if he had possessed a license and license had been suspended. The cabinet may, upon receiving a record of the conviction in this state of a nonresident driver of a motor vehicle of any offense under the motor vehicle laws, forward a notice of that person's conviction to the proper officer in the state of which the person so convicted is a resident.

(4) The Transportation Cabinet is forbidden from suspending or revoking an operator's license or assessing points or any other form of penalty against the holder thereof for speeding violations or speeding convictions form other states. This subsection shall apply only to speeding violations. This section shall not apply to a commercial driver's license.

(5) Each operator's license which has been cancelled, suspended or revoked shall be surrendered to and retained by the cabinet. At the end of the period of cancellation, suspension or revocation the license may be returned to the licensee after he has complied with all requirements for the issuance or reinstatement of his driving privilege.

Ky. Rev. Stat. § 189.290. Operator of vehicle to drive carefully. – (1) The operator of any vehicle upon a highway shall operate the vehicle in a careful manner, with regard for the safety and convenience of pedestrians and other vehicles upon the highway.

(2) No person shall wilfully operate any vehicle on any highway in such a manner as to injure the highway.

Ky. Rev. Stat. § 189.635. Vehicle accident reports by operators, law enforcement officers, and agencies. – (1) The Justice Cabinet, Department of State Police, shall be responsible for maintaining a reporting system for all vehicle accidents which occur within the Commonwealth. Such accident reports shall be utilized for such purposes as will improve the traffic safety program in the Commonwealth involving the collection, processing, storing, and dissemination of such data and the establishment of procedures by administrative regulations to insure that uniform definitions, classifications, and other federal requirements are in compliance.

(2) Any person operating a vehicle on the highways of this state who is involved in an accident resulting in fatal or nonfatal personal injury to any person or damage to the vehicle rendering the vehicle inoperable shall be required to immediately notify a law enforcement officer having jurisdiction. In the event the operator fails to notify or is incapable of notifying a law enforcement officer having jurisdiction, such responsibility shall rest with the owner of the vehicle or any occupant of the vehicle at the time of the accident. A law enforcement officer having jurisdiction shall investigate the accident and file a written report of the accident with his law enforcement agency.

(3) Every law enforcement agency whose officers investigate a vehicle accident of which a report must be made as required in this chapter shall file a report of the accident with the Department of State Police within ten (10) days

after investigation of the accident upon forms supplied by the department.

(4) Any person operating a vehicle on the highways of this state who is involved in an accident resulting in any property damage exceeding five hundred dollars ($500) in which an investigation is not conducted by a law enforcement officer shall file a written report of the accident with the Department of State Police within ten (10) days of occurrence of the accident upon forms provided by the department.

(5) All accident reports filed with the Department of State Police in compliance with subsection (4) above shall remain confidential except that the department may disclose the identity of a person involved in an accident when his identity is not otherwise known or when he denies his presence at an accident.

Ky. Rev. Stat. § 431.450. Uniform citation. –

(1) The department of state police in consultation with the transportation cabinet shall design, print, and distribute to all law enforcement agencies in the Commonwealth a uniform citation.

(2) The citation shall:

(a) Be approved by the Supreme Court;

(b) Consist of an original document and five (5) copies;

(c) Be serially numbered in such a manner that the year of issue and the individual citation number may be readily ascertained, and

(d) Contain such other information as may be required by the Supreme Court.

(3) The circuit court clerk shall maintain a system of accountability for all citations issued in accordance with rules and regulations issued by the Supreme Court to assure that citations are not wrongfully destroyed, tampered with, or otherwise compromised in any manner.

(4) All peace officers in the Commonwealth shall use the uniform citation for all violations of the traffic laws and for all felonies, misdemeanors and violations

601 Kentucky Administrative Regulation 13:010. Medical Review Board; basis for examination, evaluation, tests.

RELATES TO: KRS 186.570(1)(c)

STATUTORY AUTHORITY: KRS 186.400

NECESSITY AND FUNCTION: The Medical Review Board has existed by virtue of administrative regulations since June, 1964. Subjects who come to the department's attention because of physical or mental problems which may affect their driving ability are required to submit to physical examinations. The results of these exams are then reviewed by the physicians on the board. Based on their professional experience they recommend either total denial of a license or a limited one (e.g. daylight hours, left and right rearview mirrors, another examination in three (3) months, etc.), or they determine that the disability suffered should not affect the person's driving ability. This negates the capriciousness which could exist in the great discretion granted the department by the legislature in KRS 186.570. Whenever the recommendation of the board is for suspension or an extremely limited license, the subject is entitled to a hearing on the matter (since the Supreme Court's BELL v. BURSON decision) and this regulation sets out the procedure for same.

Section 1. There is hereby created a Medical Review Board to determine whether any applicant for or any holder of a valid Kentucky operator's license has physical or mental infirmities which affect or limit the driving ability or make it unsafe for said person to operate a motor vehicle upon the public highways. The board shall consist of the Commissioner of the Department of Vehicle Regulation of the transportation Cabinet or his representative, not less than three (3) physicians licensed to practice medicine in the Commonwealth of Kentucky, and anyone else deemed necessary to properly review a case brought before the board. The physicians on the board shall be appointed by the Commissioner of the Department of Vehicle Regulation. The Commissioner of the Department of Vehicle Regulation or his representative shall prescribe the time and place for the board to meet. Any proceeding conducted by the board shall be construed to be a meeting within the meaning of this section when three (3) physician members are present and participating. Members of the board who participate in a meeting shall be reimbursed for necessary expenses incurred in attending such meeting.

Section 2. (1) When the Commissioner or the Department of Vehicle Regulation or his representative receives notice that one (1) or more of the conditions listed in Section 4 of this regulation exists in a person and that such physical or mental infirmities may render it unsafe for him to operate a motor vehicle upon the public highways, the commissioner shall refuse to issue an operator's license to said person or he shall suspend the existing driving privilege of said person unless the person submits to an examination by a qualified physician within forty-five (45) days of notification of the commissioner's intentions.

(2) If the Medical Review Board deems that an examination by a qualified physician is necessary. The required

medical examination shall be conducted at the person's own expense by any licensed physician of his choice. The examining physician shall report within forty-five (45) days the results of his examination directly to the Medical Review Board on a form furnished by the Department of Vehicle Regulation.

(3) As soon as possible after receipt of the completed form the Medical Review Board shall evaluate it and may make recommendations to the Department of Vehicle Regulation for further examination or testing or on restriction of the person's driving privilege. When the board recommends further examination or investigative testing the Commissioner of the Department of Vehicle Regulation or his representative shall notify the person of the date by which he shall comply in order to retain or obtain his driving privilege.

Section 3. When the Medical Review Board pursuant to Section 2(3) of this regulation recommends total suspension of a person's driving privilege or any limitations thereon, the Commissioner of the Department of Vehicle Regulation or his representative shall notify the person at the last known address of said person that this action will be taken unless a written request for a hearing before the board is received within twenty (20) days following delivery of the notice. The hearing shall be scheduled as early as practicable at a time and place designated by the commissioner or his representative and notice of same shall be mailed to the person involved no later than ten (10) days prior to the hearing date. The commissioner or his representative shall preside at the hearing before the Medical Review Board and at least three (3) physician members shall be present. The presiding officer may administer oaths and may issue subpoenas for the

attendance of witnesses and the production of relevant books and papers. the scope of the hearing shall be limited to the presentation of the evidence upon which the Medical Review Board made their recommendation and any medical evidence the petitioner wishes to present in explanation or refutation of this evidence. Evidence may be presented in the form of depositions. All testimony at the hearing shall be recorded and together with any depositions or exhibits introduced at the hearing shall form the complete record. Within ten (10) working days after the hearing the commissioner shall issued a decision and this shall be promptly forwarded to the petitioner.

Section 4. The Commissioner of the Department of Vehicle Regulation or his representative shall promptly notify the person involved to submit to the physical examination set out in Section 2 of this regulation when one (1) or more of the following conditions exist:

(1) Driver has indicated that he "blacked out" lost consciousness or suffered a seizure prior to a reportable motor vehicle accident;

(2) Driver has been named in an affidavit by at least two (2) citizens as being incapable of properly operating a motor vehicle due to physical or mental infirmities.

(3) Driver has been reported by a physician as being incapable of driving safely due to physical or mental condition or due to medication prescribed for an extended time:

(4) Driver has been reported by a law enforcement officer after being observed driving or behaving in an erratic or dangerous manner which indicates a possibility of physical or mental infirmity;

(5) Applicant for operator's license or for renewal of same has obvious physical or mental impairment:

(6) Driver's official record kept by the Department of Vehicle Regulation indicates a possibility of physical or mental impairment;

(7) Driver has reported that he/she has suffered an epileptic seizure or any type of syncopal episode;

(8) Driver has been reported by a commonwealth attorney, county attorney, county clerk, circuit clerk, sheriff, or judge as being incapable of driving due to a physical or mental impairment.

APPENDIX C

Eastern District of Kentucky
FILED NOV 5 1991
AT LEXINGTON
LESLIE G. WHITMER
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON
CIVIL ACTION NO. 91-516

JAMES RICKY JONES and
VERA JONES — PLAINTIFFS,

VS. **COMPLAINT**

CITY OF CARLISLE,
KENTUCKY, PREFERRED
RISK MUTUAL INSURANCE
COMPANY, and MARK BYRD — DEFENDANTS.

*** *** ***

For their complaint herein, plaintiffs state as follows:

COUNT I

JURISDICTION

1. This Court has jurisdiction of Count I pursuant to 42 U.S.C. §1983, 28 U.S.C. §1331, 28 U.S.C. §1343, and venue as per 28 U.S.C. §1391.

2. At all times relevant hereto Mark Byrd was a citizen and resident of the Commonwealth of Kentucky, primarily residing in Carlisle, Nicholas County, Kentucky.

3. Mark Byrd is an epileptic who has suffered from an uncontrolled seizure disorder since infancy.

4. Mark Byrd obtained a Kentucky motor vehicle operator's license in 1983.

5. Carlisle, Kentucky (hereinafter Carlisle), is a municipality with a population of 1800 people approximately, located in Nicholas County, Kentucky, and Carlisle exists and acts under authority of the law of the Commonwealth of Kentucky and in the instant case acts under color of state law.

6. Carlisle has the power to sue and be sued.

7. Carlisle has established and maintains a police force by authority of state law and under color of state law.

8. The statutory law of the Commonwealth of Kentucky is embodied in the Kentucky Revised Statutes (hereinafter KRS).

9. As per KRS 95.015, the members of the Carlisle Police Department are to enforce the statutory laws of the Commonwealth of Kentucky.

10. As per KRS 95.710, the members of the Carlisle Police Department are to be sagacious.

11. As per KRS 95.760, the members of the Carlisle Police Department are required to faithfully perform the duties of their office.

12. As per KRS 431.450, the Carlisle police are to use a uniform citation for all violations of traffic laws as are listed in KRS 431.451, one of which laws is KRS 189.290 requiring that motor vehicles be operated carefully.

13. As per KRS 95.740, the police of Carlisle have law enforcement power and responsibility throughout Nicholas County, Kentucky.

14. KRS 189.635 requires that a Carlisle policeman investigating an automobile accident which causes damage to a motor vehicle or which causes a personal injury, to file a written report of the accident with the Carlisle Police Department.

15. KRS 189.635 requires the Carlisle Police Department to file the written report of an accident mentioned in numerical paragraph 14 above, with the Kentucky State Police.

16. KRS 186.570 allows the Commonwealth of Kentucky to withdraw the motor vehicle operator's license of a person having a mental or physical infirmity making that person unsafe to operate a motor vehicle.

17. 601 Kentucky Administrative Regulation (hereinafter KAR) 13:010 is a valid regulation of the Commonwealth of Kentucky.

18. As per 601 KAR 13:010, if the Commonwealth of Kentucky receives notice that a motor vehicle operator has suffered a seizure prior to a reportable motor vehicle accident, if a law enforcement official reports to the Commonwealth of Kentucky that a motor vehicle operator is driving in a manner as to indicate the driver has a possibility of a physical or mental infirmity, if a motor vehicle operator's official record indicates the possibility of a physical or mental infirmity, or if a motor vehicle operator reports he has suffered an epileptic seizure, then the Commonwealth of Kentucky will cause that motor vehicle operator to submit to a medical examination to determine the motor vehicle

operator's fitness to operate a motor vehicle, and if the operator is unfit to operate a motor vehicle, then the operator's license will be suspended or withdrawn by the Commonwealth of Kentucky.

19. Shortly after receiving his motor vehicle operator's license in 1983, Mark Byrd experienced a seizure while operating a motor vehicle on Main Street in Carlisle and ran off the road, hit a stone wall in front of the Nicholas County Courthouse and was knocked unconscious. This accident was investigated by the Carlisle Police Department, but the Carlisle police have no report of the accident. No citation or law enforcement action was taken against Mark Byrd as a result of this accident.

20. On or about June, 1983, Mark Byrd suffered an epileptic seizure while driving a motor vehicle on Main Street in Carlisle and crossed over the center-line of the roadway and struck a tractor coming in the opposite direction while that tractor was occupied. This accident was investigated by the Carlisle police, and the Carlisle police maintain a report of this accident. No citation or law enforcement action was taken against Mark Byrd as a result of this accident.

21. In 1984, Mark Byrd suffered an epileptic seizure while operating a motor vehicle on Mockingbird Lane in Carlisle, and his vehicle left the roadway, traveled across the lawn of a residence, and struck a residence. This accident was investigated by the Carlisle Police Department, but the Carlisle police have no report of the accident. No citation or law enforcement action was taken against Mark Byrd as a result of this accident.

22. In 1985, Mark Byrd was operating a motor vehicle on Main Street in Carlisle, and his operation of the motor

vehicle was such that it left the roadway and struck a parking meter near the United States Post Office in Carlisle. It is unknown whether the Carlisle police were aware of this accident or investigated it, and the Carlisle police have no report of this accident. No citation or law enforcement action was taken against Mark Byrd as a result of this accident.

23. In 1986, Mark Byrd was operating a motor vehicle on the public roads of Carlisle and experienced an epileptic seizure and pulled to the side of the road and passed out. This accident caused property damage. The accident was investigated by the Carlisle police, but the Carlisle police have no report of this accident. No citation or law enforcement action was taken against Mark Byrd as a result of this accident.

24. In 1987, Mark Byrd was operating a motor vehicle on the public roadways of Carlisle and experienced an epileptic seizure which caused the vehicle operated by Mark Byrd to leave the roadway and hit a fire hydrant near Small's Greenhouse in Carlisle. This accident was investigated by the Carlisle police, but the Carlisle police have no report of the accident. No citation or law enforcement action was taken against Mark Byrd as a result of this accident.

25. In 1987, Mark Byrd suffered an epileptic seizure while operating a motor vehicle in Carlisle, and Mark Byrd's vehicle left the roadway and hit a structure known as Small's Greenhouse. This accident was investigated by the Carlisle police, but the Carlisle police have no report of the accident. No citation or law enforcement action was taken against Mark Byrd as a result of this accident.

26. Within the past five years, Mark Byrd was found suffering a seizure in a motor vehicle near the Dairy Queen in Carlisle, and this event was investigated and assistance

was rendered by fire and rescue personnel of Carlisle. Carlisle police have no report of the accident. No citation or law enforcement action was taken against Mark Byrd as a result of this event.

27. On or about November 13, 1990, on U.S. Hwy. 68, a public highway in Nicholas County, Kentucky, Mark Byrd was operating a motor vehicle while he experienced an epileptic seizure causing him to lose control of his vehicle and causing his vehicle to cross over the center-line into the oncoming lane of traffic and strike head-on a motor vehicle there and then operated by the plaintiff, James Ricky Jones, and this accident severely and permanently injured James Ricky Jones. No citation or law enforcement action was taken against Mark Byrd as a result of this accident.

28. With the exception of the accident occurring on or about November 13, 1990, the Kentucky State Police does not have reports of any of Mark Byrd's accidents mentioned herein.

29. It is the deliberate policy or custom of Carlisle not to train its policemen subsequent to their employment.

30. It is the deliberate policy or custom of Carlisle not to supervise its policemen so as to determine if they follow the laws of the Commonwealth of Kentucky.

31. It is the deliberate policy or custom of Carlisle not to report all of Mark Byrd's motor vehicle accidents as required by state law.

32. At all times subsequent to Mark Byrd's first seizure related automobile accident, Carlisle knew that Mark Byrd was an unfit and unsafe motor vehicle operator by reason of Mark Byrd's epileptic condition.

33. Carlisle's failure to train its police and failure to supervise its police have caused the Carlisle police to be inadequate to the task to be performed by them, especially as concerns duties of the police as regards unfit and unsafe operators of motor vehicles.

34. The actions of Carlisle as alleged herein are reckless and wanton and constitute gross negligence.

35. It is the policy or custom of Carlisle to let Mark Byrd operate a motor vehicle even though Carlisle knows Mark Byrd is an unfit and unsafe driver, and it is the policy or custom of Carlisle not to enforce the laws of the Commonwealth of Kentucky regarding the operation of motor vehicles against Mark Byrd. The effect of these policies or customs is in fact to encourage Mark Byrd to drive a motor vehicle. The actions and policies or customs of Carlisle are substantially certain to result in deprivation of rights secured to United States citizens such as James Ricky Jones by the United States Constitution, including without limitation rights secured to James Ricky Jones by the Fourteenth Amendment to the United States Constitution.

36. The actions and policies or customs of Carlisle have caused James Ricky Jones to suffer a deprivation of rights secured to him by the United States Constitution, including without limitation those rights secured to him by the Fourteenth Amendment to the United States Constitution.

37. The actions and policies or customs of Carlisle as enumerated herein amount to a deliberate indifference to the constitutional rights of persons such as James Ricky Jones who use the public highways in Carlisle and in Nicholas County, Kentucky.

38. James Ricky Jones as a citizen of the United States of America and as a citizen of the Commonwealth of Kentucky is entitled to protections of the laws of the United States and of the Commonwealth of Kentucky.

39. The actions and policies or customs of Carlisle are abusive in that they amount to a conscious decision not to enforce the laws of the Commonwealth of Kentucky against Mark Byrd and this conscious decision is a deliberate indifference to the rights of James Ricky Jones and those similarly situated, said decision causing James Ricky Jones to be deprived of rights secured to him under the United States Constitution, including without limitation rights secured to him by the Fourteenth Amendment to the United States Constitution.

40. The actions and policies or customs of Carlisle have injured James Ricky Jones, and because of this, Carlisle is liable to pay damages to James Ricky Jones in the amount of Three Million Dollars ($3.0 Million).

41. As per 42 U.S.C. §1988, James Ricky Jones is entitled to recover a reasonable attorney's fee against Carlisle.

COUNT II

42. They reaffirm and re-allege the allegations contained in paragraphs 1 through 41 of this complaint.

43. The Court has ancillary and/or pendent jurisdiction of this Count II due to the fact that the allegations herein arise from a common nucleus of operative facts involved in other counts.

44. At all times relevant hereto, the City of Carlisle, Kentucky, was acting through its agents and employees, acting in the real and/or apparent course and scope of their

agency or employment.

45. At all times relevant hereto, the City of Carlisle, Kentucky, owed a duty to the plaintiffs herein to exercise ordinary care in providing police protection and law enforcement for the benefit of the plaintiffs herein and the public at large.

46. Prior to November of 1990, the City of Carlisle, Kentucky, knew or should have known that Mark Byrd was an unsafe, dangerous, and unfit operator of a motor vehicle and that Mark Byrd had been involved in numerous automobile accidents caused by Mark Byrd's seizure disorder.

47. The City of Carlisle, Kentucky, breached the duty it owed to plaintiffs by negligently and carelessly providing police protection and law enforcement, and this breach of duty was a substantial factor in causing an automobile accident involving Mark Byrd and James Ricky Jones on or about November 13, 1990, on U.S. Hwy. 68 in Nicholas County, Kentucky.

48. Pursuant to KRS 189.635, the City of Carlisle, Kentucky, owed a duty to plaintiffs to file reports of automobile accidents involving Mark Byrd. The City of Carlisle, Kentucky, breached this duty and the breach was a substantial factor in causing the automobile accident, occurring on or about November 13, 1990, involving Mark Byrd and James Ricky Jones.

49. As a direct result of the aforementioned automobile accident, James Ricky Jones has incurred and will incur pain and suffering, has lost wages, has incurred and will incur medical expenses, and his power to work and earn money has been impaired permanently, all to his damage in the amount of $3.0 Million Dollars.

50. Vera Jones is the wife of James Ricky Jones, and as a result of the negligence of the City of Carlisle, Kentucky, she has suffered loss of consortium with her husband, to her damage in the amount of Five Hundred Thousand Dollars ($500,000.00).

51. The actions of the City of Carlisle, Kentucky, were reckless and wanton and constitute gross negligence, thereby entitling plaintiffs to punitive damages in an amount to be determined.

52. The actions of the City of Carlisle, Kentucky are conduct carried out by them with a flagrant indifference to the rights of the plaintiffs and with a subjective awareness that such conduct will result in human death or bodily harm, thereby entitling plaintiffs to punitive damages in an amount to be determined.

COUNT III

53. They re-affirm and re-allege the allegations contained in paragraphs 1 through 52 of this complaint.

JURISDICTION

54. This Court has jurisdiction of Count III pursuant to 28 U.S.C. §1332r 28 U.S.C. §2201, 28 U.S.C. §2202, and Federal Rule of Civil Procedure 57.

55. Alternatively, the Court has ancillary and/or pendent jurisdiction of this Count III due to the fact that the allegations herein arise from a common nucleus of operative facts involved in other counts.

56. Plaintiffs are citizens of Kentucky.

57. Preferred Risk Mutual Insurance Company (hereinafter Preferred) is a citizen of the State of Iowa, is not a citizen of the State of Kentucky, and does not have a principal place of business in the State of Kentucky.

58. The amount in controversy under Count III is in excess of Fifty Thousand Dollars ($50,000.00).

59. Preferred is a corporation duly authorized and existing by authority of law with the power to sue and be sued, and it is qualified to carry on an insurance business in the Commonwealth of Kentucky.

60. Preferred entered into an insurance contract in Kentucky with plaintiffs by which plaintiffs purchased underinsured motorist coverage, which coverage is applicable to the accident mentioned hereinabove occurring on or about November 13, 1990.

61. Mark Byrd is an underinsured motorist because his automobile liability insurance coverage is insufficient to compensate plaintiffs for their losses.

62. Preferred owes plaintiffs the sum of One Hundred Thousand Dollars ($100,000.00) under the underinsured motorist coverage issued by Preferred, and plaintiffs have performed all conditions precedent to recovery.

63. A real and actual controversy exists between Preferred and plaintiffs concerning whether the liability limit on the underinsured motorist coverage in the insurance contract issued by Preferred is Fifty Thousand Dollars ($50,000.00) or One Hundred Thousand Dollars ($100,000.00).

64. Plaintiffs contend that the underinsured motorist limit of liability is One Hundred Thousand Dollars ($100,000.00) per person and Preferred contends that the

limit of liability on the underinsured motorist coverage is Fifty Thousand Dollars ($50,000.00) per person.

65. Plaintiffs request the Court to declare that the underinsured motorist limit of liability under the aforementioned insurance contract issued by Preferred is One Hundred Thousand Dollars ($100,000.00) per person.

COUNT IV

66. They re-affirm and re-allege the allegations contained in paragraphs 1 through 65 of this complaint.

67. The Court has ancillary and/or pendent jurisdiction of this Count IV due to the fact that the allegations herein arise from a common nucleus of operative facts involved in the other counts.

68. On or about November 13, 1990, on U.S. Hwy. 68, a public highway in Nicholas County, Kentucky, Mark Byrd so carelessly and negligently operated a motor vehicle so as to cause it to collide with a motor vehicle being operated by James Ricky Jones.

69. As a direct and proximate result of the aforementioned negligence, James Ricky Jones has incurred and will incur pain and suffering, has lost wages, has incurred and will incur medical expenses, and his power to work and earn money has been impaired permanently, all to his damage in the amount of $3.0 Million Dollars.

70. Vera Jones is the wife of James Ricky Jones, and as a direct and proximate result of Mark Byrd's negligence, she has suffered loss of consortium with her husband, all to her damage in the amount of Five Hundred Thousand Dollars ($500,000.00).

DEMAND FOR JURY TRIAL

The plaintiffs demand a trial by jury on all issues so triable.

WHEREFORE, the plaintiffs demand:

1. Under Count I, James Ricky Jones demands judgment against Carlisle, Kentucky, in the amount of $3.0 Million Dollars plus a reasonable attorney's fee;

2. Under Count II, James Ricky Jones demands judgment against Carlisle, Kentucky, in the amount of $3.0 Million Dollars, Vera Jones demands judgment against Carlisle, Kentucky, in the amount of Five Hundred Thousand Dollars ($500,000.00), and plaintiffs demand judgment against Carlisle, Kentucky, for punitive damages in an amount to be determined;

3. Under Count III, James Ricky Jones demands judgment against Preferred Risk Mutual Insurance Company declaring that the insurance contract sold to him by Preferred Risk Mutual Insurance Company provides underinsured motorist coverage in favor of James Ricky Jones in the amount of One Hundred Thousand Dollars ($100,000.00), and James Ricky Jones demands judgment against Preferred Risk Mutual Insurance Company in the amount of One Hundred Thousand Dollars ($100,000.00);

4. Under Count IV, James Ricky Jones demands a judgment against Mark Byrd in the amount of $3.0 Million Dollars, and Vera Jones demands judgment against Mark Byrd in the amount of Five Hundred Thousand Dollars ($500,000.00);

5. A trial by jury; and

6. Their costs herein expended.

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